

“Live Free or Die”—Liberty and the First Amendment

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I. INTRODUCTION

Recent years have witnessed an extraordinary expansion of the First Amendment. In a number of critical areas, the Roberts Court has significantly elevated the level of protection for speech, virtually abandoning the concept of low-value speech¹ and displaying increasing suspicions of content-based speech regulation.² In addition, the Court has been decidedly skeptical of campaign finance regulation.³ Not surprisingly, legislative choices once understood to be well within the bounds of democratic decision-making are these days frequently challenged as violating individual speech rights.

The superficial appeal of the libertarian First Amendment will eventually wear thin with its own success. As breaches into core legislative domains from price regulation and minimum wage to food and drug safety become more frequent and salient, courts will find it harder and harder to sustain the current

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¹ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011); *United States v. Stevens*, 559 U.S. 460, 472 (2010).

² E.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–28 (2015); *Brown*, 564 U.S. at 799.

³ E.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014); *Citizens United v. FEC*, 558 U.S. 310, 340–41, 371 (2010).

course.⁴ Yet, the libertarian First Amendment has undeniable appeal.⁵ By offering deceptively bright lines and speciously principled coherence, it promises a path out of the maze that First Amendment doctrine has become, and judges are likely to struggle to detach themselves from it.

What is needed, therefore, is a compelling alternative theoretical mooring from which to analyze contemporary First Amendment controversies. This Article sets forth a *prima facie* case that this requires committing to a nuanced articulation of the self-governance interest.⁶ In doing so, it makes two central claims about the process of resisting the superficial appeal of the libertarian conception of the First Amendment. First, it argues that disputes at the cutting edge of First Amendment litigation would be significantly clarified if recast in the register of separation of powers.⁷ It is no accident that the Roberts Court has been accused of reviving *Lochnerism* under cover of the First Amendment.⁸ The real threat of the new doctrine is to our democracy.

Second, and more controversially, it argues that cabinining the libertarian First Amendment requires abandoning First Amendment pluralism.⁹ While no one seriously denies that an interest in furthering democracy is, and ought to be, a primary driver of First Amendment jurisprudence, many worry that the self-governance interest provides too narrow a conception of the freedom of speech.¹⁰ As a result, scholars of the First Amendment, especially since the 1960s, have proclaimed that a plurality of co-equal interests underlie the constitutional protection for freedom of speech, and the doctrine has

⁴ Ashutosh Bhagwat, *When Speech is Not "Speech,"* 78 OHIO ST. L.J. 839, 842 (2017).

⁵ The number of liberal Justices that can be found on record in favor of an ever-expansive vision of the First Amendment provides a cautionary tale in this regard. *See, e.g.,* *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (decided eight-to-zero with Justices Ginsburg and Kagan joining the majority); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (decided six-to-three with Justice Sotomayor in the majority); *Brown*, 564 U.S. at 787 (decided seven-to-two with Justices Ginsburg, Sotomayor, and Kagan in the majority); *Stevens*, 559 U.S. at 463 (decided eight-to-one with Justices Ginsburg, Breyer, Sotomayor, and Stevens in the majority).

⁶ For other scholarship calling for further development and commitment to the First Amendment's self-governance theory, see Bhagwat, *supra* note 4, at 884, and Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016) (arguing that First Amendment theorizing must begin to account for the other textual provisions, each of which advances self-governance and an active vision of republican citizenship).

⁷ *See infra* Part III.A.

⁸ *See, e.g., Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting).

⁹ *See infra* Part II.C.

¹⁰ *See, e.g.,* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH (West) § 2:6 (Apr. 2015) ("The democratic self-governance theory is not controversial in its *minimal* sense—no one disputes that freedom of speech is essential to democracy. The theory is, however, controversial in its *maximum* sense: If the theory is advanced as the *only* justification for freedom of speech, it tends to result in doctrines that do not protect speech that appears to have little or nothing to do with politics and self-governance, or speech that appears antithetical to the basic constitutional order.").

developed in these terms. Throughout, the assumption has been that there is no cost to this theoretical pluralism. The Roberts Court's First Amendment jurisprudence lays bare why this is a mistake, and therefore why it is critical to return the focus of First Amendment theorizing to the self-governance rationale.

II. LIBERTY AND THE FREEDOM OF SPEECH

When Patrick Henry declared “but as for me, give me Liberty or give me death!,” the primary liberty he and his fellow revolutionaries sought was the liberty *to* set the terms of governance with his fellow men.¹¹ The constraints subsequently placed by the First Amendment on government control over the press, individual and collective speech, political action in the form of assemblies, associations and petitioning for redress of grievances, and personal faith can only be understood in light of this ultimate purpose. These freedoms *from* were selected for special protection only because they were understood to secure a foundation for the freedom *to* govern.¹²

The First Amendment, in other words, secures a set of conditions (freedom of speech, press, association, and public assembly) that are necessary to government responsiveness and accountability. While in many respects this is simply a restatement of the obvious, it turns out, as with much that is obvious, a lot more follows than is typically thought. For one, it suggests that a sensible First Amendment doctrine is one that both affords strong protections within its domain and *delimits* the sphere of robust First Amendment rights. In particular, the free speech rights of individuals cannot be so extensive as to undermine the end for which they were established, what we now call democratic politics. For another, it follows that individuals' *free speech* rights cannot be so great as to undermine, either directly or indirectly, the co-equal rights secured by the text of the First Amendment. That is, individuals' free speech rights cannot be so great as to undermine the capacity for collective political action through means other than discourse.

¹¹ Patrick Henry, Give Me Liberty or Give Me Death, Declaration at the Virginia Convention (Mar. 23, 1775) (transcription available at The Avalon Project, Yale Law School), http://avalon.law.yale.edu/18th_century/Patrick.asp [<https://perma.cc/4F5F-9JLP>]. I wish to thank Jane Mansbridge for this reminder at a conference I recently attended as well as Vincent Blasi for sharing the story of Patrick Henry's influence on Virginia politics and how it led to James Madison's agreement to introduce the First Amendment as a congressman.

¹² *Cf.* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 33 (2005) (describing the Framers' commitment to create a Constitution capable of “furthering active liberty, . . . a form of government in which all citizens share the government's authority, [and] participat[e] in the creation of public policy”).

A. “Live Free or Die”—Revisiting the Meaning of Liberty

The First Amendment cordons off certain spaces from government intervention not as an end in itself, but in order to preserve the possibility of the republican form of government created by the Constitution. While the Bill of Rights guarantees a range of individual freedoms, it is critical to view them in context.

The Revolution had been fought primarily for “the positive liberty of self-government.”¹³ This was the liberty to which Patrick Henry referred, and the concept Major General John Stark invoked, when he asked his fellow veterans of the Revolutionary War to remember those who had died with the toast “Live Free or Die.”¹⁴ Major General Stark was acknowledging by his toast that those who initially petitioned the British Parliament for redress, and ultimately fought for independence, did so to secure a voice in their government. The modern libertarian appropriation of that phrase is, thus, a revisionist misappropriation.¹⁵ Parliament’s alleged breach of the customary constitution was not the act of taxation as such. It was the imposition of taxes on British citizens by fiat.¹⁶ The revolutionary call was “No Taxation Without Representation” for a reason.

Our tendency to speak as if the central dilemma of constitutional law is how to balance the tension between democracy and individual rights, especially First Amendment Rights, is unfortunate. It inaccurately implies a

¹³ See Deborah Hellman, Essay, *Resurrecting the Neglected Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 233, 233 (2016) (noting that “[t]he liberty of citizens in a democracy has two components—the negative liberty to be let alone and the positive liberty of self-government”).

¹⁴ Major General John Stark is said to have written the toast for the thirty-second anniversary reunion of the 1777 Battle of Bennington in Vermont, which he could not attend due to poor health. Letter from Major General John Stark to Comm. at Bennington (July 31, 1809), in HOWARD PARKER MOORE, A LIFE OF GENERAL JOHN STARK OF NEW HAMPSHIRE 499, 499–500 (1949); see also *State v. Hoskin*, 295 A.2d 454, 455 (N.H. 1972) (noting toast in full as “Live free or die; death is not the worst of evils”).

¹⁵ See, e.g., Bob Burg, *Persuasion for the Cause of Liberty*, MO. LIBERTARIAN PARTY (Feb. 2003), <https://lpmo.org/news/Give-Me-Liberty> [<https://perma.cc/P6G3-ZJ8R>] (equating liberty with freedom from government intervention).

¹⁶ *Declaration of the Causes and Necessity of Taking Up Arms* (July 6, 1775), in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1776, at 213, 214–15 (Julian P. Boyd et al. eds., 1950) (“They have undertaken to give and grant our Money without our Consent, though we have ever exercised an exclusive Right to dispose of our own Property; . . . But why should we enumerate our Injuries in detail? By one Statute it is declared, that Parliament can ‘*of right make Laws to bind us in all Cases whatsoever*.’ What is to defend us against so enormous, so unlimited a Power? Not a single Man of those who assume it, is chosen by us; or is subject to our Controul or Influence” (second emphasis added)).

zero-sum game between the First Amendment's negative rights and the larger republican project.¹⁷

The First Amendment's negative liberties are not at odds with self-governance; they are its foundation. Its negative liberties are granted in the service of ensuring that the political process by which those legislative judgments are made is an open one.¹⁸ The First Amendment cordons off certain spaces for individual and collective liberty in order to preserve the possibility that democratic majorities will be able to hold elected bodies accountable to the public interest.¹⁹ Put differently, it establishes certain freedoms in order to maintain a distinction between civil society and government—to provide a space for “We the People.”

It follows, therefore, that the First Amendment rights of individuals cannot be so extensive as to undermine the capacity of legislatures to serve their most basic function—reaching provisional decisions, after deliberation, on contested values.²⁰ This is not a matter of balancing competing constitutional principles, but of acknowledging that the end for which a right is established must define its limits.

Important consequences for the scope of First Amendment rights follow. Preserving the capacity of legislatures to serve their most basic constitutional function requires a presumption of constitutionality with respect to domains

¹⁷ See Hellman, *supra* note 13, at 233 (2016) (arguing that democracy can only function properly when both types of liberties are given their appropriate weight).

¹⁸ See Tabatha Abu El-Haj, Essay, *Wholly Native to the First Amendment: The Positive Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 241, 242 (2016) (arguing that the First Amendment preserves the conditions necessary for the positive liberty described by Professor Hellman); Bhagwat, *supra* note 6, at 1100–11 (describing how each of the “democratic rights” of the First Amendment, embodied in the Speech, Press, Assembly, and Petition Clauses, furthers self-governance). See generally BURT NEUBORNE, *MADISON'S MUSIC* (2015) (making a similar argument about the Bill of Rights as a whole).

¹⁹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (arguing that the constitutional commitment to a functioning republic is “rooted . . . in the First Amendment itself” and as such “the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*”); see also Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 981 (2011) (“[E]nsuring self-governance is the primary structural purpose of the First Amendment . . .”); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (“[T]he best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance.”).

²⁰ This focus on legislatures is not meant to preclude the possibility of extending these insights to the actions of executive officers or other instantiations of popular sovereignty, such as juries. The First Amendment’s constraints on the actions of executive officials and juries must, however, be understood in light of its role in securing the legislative function. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

that are quintessentially the prerogative of the legislature,²¹ regardless of whether the regulatory choices impact speech, assembly, or association.

Even without fully resolving the question of what constitutes a quintessential legislative domain (a topic to which we will return below), it should be obvious that this approach has clear doctrinal implications for commercial speech doctrine.²² The ability of representative bodies “to set the rules for the economy and establish its boundaries” is central to any account of the positive liberty dedicated to the legislative sphere.²³ Should workers be able to sell their labor for less than a living wage? Should drug manufacturers have to disclose to consumers the ingredients in their products and all known side effects? Should it be legal to pay for sex or for a surrogate mother to sell the baby (not simply to be reimbursed for the inconvenience of the work)? It is precisely because such decisions are highly contested that they must be resolved through politics, and the legislature must be the final arbiter.

The central misstep of a libertarian First Amendment is its assumption that the protection of individual freedom of speech is an end in itself.²⁴ The resulting misreading of the First Amendment, in which limitless free speech rights are substituted for the constitutional rights actually granted, warps the meaning of the First Amendment in the same way that the State of New Hampshire has warped the meaning of John Stark’s toast, “Live Free or Die.”²⁵ The Founders may have had a preference for a smaller, less interventionist government. They may have envisioned a world of “buyer beware” contracting in which charlatans were free to hawk their ineffective, harmful drugs at will, but what they constitutionalized was a system of responsive government, not their particular vision of the proper role of government in the market.

None of the above should be taken as a call for weak First Amendment rights. Freedom from government interference with legislative inputs—broadly conceived to include not only public debate, free association, peaceable assembly, and the press, but also cultural practices that facilitate the development of autonomous individuals—is necessary for the legislative

²¹ See Hellman, *supra* note 13, at 235 (arguing that “when the polity, through its representatives, makes decisions that implicate the liberty of self-government most strongly, those decisions deserve extra deference”).

²² See *infra* Part III.A.

²³ Hellman, *supra* note 13, at 233 (arguing that “meaningful self-government requires that elected officials be able both to set the rules for the economy and establish its boundaries”).

²⁴ See Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231 (2014); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

²⁵ See generally *State v. Hoskin*, 295 A.2d 454, 455–57 (N.H. 1972) (upholding a state law requiring drivers to display the state motto, “Live Free or Die,” on their license plates and preventing citizens from covering or otherwise obscuring the motto).

outputs of the democratic process to be responsive and for legislatures to be kept in check. Within this domain, a strong presumption against legislative intrusion is warranted. In fact, there is every reason to worry that in a range of areas squarely pertinent to political inputs, and especially in the context of public assembly, protection is currently too weak to vindicate the Amendment's constitutional function—protecting a meaningful space from which citizens can influence and check government.²⁶ Instead, the framework being offered is a call to reprioritize where strong First Amendment rights should be granted.²⁷

B. *Freedom of Speech—Co-Equal Rights*

The freedom of speech, however, is neither the only nor the primary condition necessary for self-governance protected by the First Amendment.²⁸ The Supreme Court's oversight in this regard long precedes the Roberts Court and has been reinforced by the fact that, until very recently, the self-governance interest has been theorized entirely as a theory of the freedom of speech.²⁹ The result has been unfortunate in two respects for the case law: first, it has led to an overemphasis on discourse and an open marketplace of ideas in the quest for self-governance; second, and relatedly, it has led to an under-appreciation of the distinct, equally necessary prerequisites to self-governance protected by the First Amendment—most importantly, those associated with collective political participation.³⁰

The First Amendment itself is not similarly blinded by the value of freedom of speech.³¹ The Founders understood that self-governance would

²⁶ See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. PA. J. CONST. L. 949, 952–54 (2014) [hereinafter Abu El-Haj, *All Assemble*]; Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 553 (2009) [hereinafter Abu El-Haj, *The Neglected Right of Assembly*].

²⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring) (“If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.”). See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

²⁸ See Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 65 (2014) (demonstrating a First Amendment interest in democratic participation as a second necessary, if not sufficient, condition of self-governance, one that the right of association, properly conceptualized, is well suited to protect).

²⁹ *Id.* at 61 (maintaining that contemporary “scholars who have argued that the Amendment protects participatory democracy . . . theorize participation as the right of citizens to share views and shape public discourse”).

³⁰ *Id.* at 61–62.

³¹ In fact, the historical record is replete with evidence that the Founders had a decidedly narrow view of the scope of the freedom of speech and an ambivalent attitude toward

require much more than robust protection for an individual's right to speak freely.³² They understood all too well the importance of collective political conduct, in particular, as a means to check the abuse of government power.³³ Not surprisingly, the Amendment they adopted protects the rights of peaceable assembly, petition and, by extension, association, as well as freedom of religious conscience and the press.³⁴

Once again, this has practical implications for constitutional interpretation and doctrine. The First Amendment protects a range of prerequisites for responsive and accountable governance: it protects individual autonomy and expression, but equally the ability to act in concert with others to demand responsiveness and accountability from government.³⁵ The doctrine, therefore, ought to give due weight to preserving the balance between these various conditions, each of which furthers the capacity for self-governance.

Individuals' *free speech* rights ought not be so great as to undermine the co-equal rights secured by the text of the First Amendment, either directly or indirectly. This is especially the case insofar as there is good evidence that the Founders were much more concerned about protecting collective political action, as compared to individual speech or religious exercise.³⁶

protecting acts of individual expression. *See generally* LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* (1963); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997).

³² Bhagwat, *supra* note 6, at 1111 (arguing that "each of the five rights protected by the non-religious parts of the [First] Amendment—speech, press, association, assembly, and petition" has independent significance, even as "each . . . has as its primary goal the advancement of democratic self-governance"). *See generally* Abu El-Haj, *The Neglected Right of Assembly*, *supra* note 26 (exploring the political origins of the right of assembly and arguing it was established to protect social and political practices central to representative government).

³³ *See e.g.*, Abu El-Haj, *The Neglected Right of Assembly*, *supra* note 26, at 547 (noting that the right to assembly serves to protect collective action as a "mechanism to influence and check government"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529–44 (elaborating on the Founders' concerns about the ability to check abuses of government power and arguing that these concerns should inform doctrinal approaches to both the speech and press clauses).

³⁴ U.S. CONST. amend. I.

³⁵ To be clear, the claim is not that the First Amendment protects all conditions necessary to self-governance. It does not, for instance, guarantee the right to vote, even as it is certainly another necessary condition of a republican form of government. Instead, the Constitution leaves the protection of voting rights to the several states, backed up by the Guarantee Clause and Congress's ability to enforce it through the rejection of congressional delegations. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

³⁶ *See generally* Abu El-Haj, *All Assemble*, *supra* note 26, at 969–93 (reviewing early American law and finding that nineteenth-century state courts were consistently receptive to the revolutionary pedigree of the sovereign people's right to demonstrate their collective political strength on the street, even as they upheld laws that we today would consider

C. *Costs of Pluralism in First Amendment Theory*

Few would deny that enabling self-governance is *a* core purpose of the First Amendment.³⁷ Nevertheless, many have worried that an exclusive emphasis on the self-governance interest provides too narrow a conception of the freedom of speech. As a result, the notion that the First Amendment has multiple ends, including fostering a competitive marketplace of ideas and protecting individual autonomy, has flourished. The scholarly faith appears to be that asserting these other values to justify the expansion of free speech doctrine will not undermine its contribution to self-governance.³⁸

First Amendment pluralism, however, provides few meaningful limits on the freedom of speech, thereby crowding out space for self-governance. Both the metaphor of an unfettered marketplace of ideas and the emphasis on individual expression and autonomy make it exceedingly difficult to articulate a principled justification for denying coverage to any speech.³⁹ The doctrinal result has been to cast the First Amendment's protections in a decidedly libertarian light. Having conceded on coverage, determining the level of protection becomes an all too familiar freewheeling balancing calculus, in which liberals are rarely persuaded that speech rights can be outweighed by a compelling state interest in order, morality, or protecting children, while conservatives are equally unpersuaded that they should give way to an interest in preserving equality.

The principal setback to the self-governance theory was the way that its early adherents articulated its implications. Early accounts appeared to advocate for a doctrinal order in which First Amendment coverage would be limited to speech of clear political import.⁴⁰ While Robert Bork stoked the fear by embracing this conclusion, the early works of Alexander Meiklejohn can

outrageous infringements on individual free expression and religious liberty); Abu El-Haj, *The Neglected Right of Assembly*, *supra* note 26, at 569–79 (same).

³⁷ *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

³⁸ See, e.g., Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 929–44 (1990) (usefully synthesizing the rise of First Amendment pluralism and arguing that the First Amendment should be expanded to “advance the process of individual self-definition”).

³⁹ Cf. Blasi, *supra* note 33, at 545–48 (noting the tendency of the autonomy interest to lead to absolutist views of First Amendment rights because the essence of autonomy is the freedom of choice itself).

⁴⁰ E.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20, 27 (1971) (arguing that First Amendment “protection should be accorded only to speech that is explicitly political,” defined as speech “concerned with governmental behavior, policy or personnel,” and further that “[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary . . . obscene or pornographic”).

certainly be read in that same light. In 1948, for example, Meiklejohn explained:

The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.⁴¹

The basic parameters of coverage were thus established as turning on an assessment of the political relevance of the speech or association. The problem for many was that this appeared to leave in the lurch expression that, while only indirectly bearing on politics, is critically important to a functioning liberal democracy.⁴²

A properly theorized self-governance interest need not result in such a cramped conception of the First Amendment. For one, it does not compel that doctrinal distinctions turn on differentiating between political and nonpolitical speech, association, or assembly. This is neither the only nor the best account of what it means to commit to the self-governance rationale in adjudicating First Amendment claims.

Instead, a doctrine attentive to the primacy of the self-governance interest would respect the fundamental tension between positive and negative liberty: it would assure *both* sufficient autonomy in civil society such that the inputs into our republic institutions are not merely an affirmation of what elected bodies have in mind *and* leave ample space for democratic deliberation.⁴³ First Amendment protections would extend, to refine on Robert Post's formulation, to those forms of communication *and conduct* (for example, voting, protests, and association) that enable the "democratic state [to] remain[] responsive" and accountable "to the views of its citizens."⁴⁴ Entrenchment through government tampering with the authenticity of any inputs—individual conscience and character, information, viewpoints, civic and political associations, and elections—would be prohibited. And yet, care would be taken to ensure that those prohibitions did not encroach on the legislative right to provide education, regulate markets, and maintain public safety—even as

⁴¹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (Kennikat Press 1972) (1948) (emphasis added).

⁴² Meiklejohn himself came to recognize this limitation, and later in life, he adopted a much more expansive view of what fell within the ambit of politically relevant information. See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57, 262–63 (1961).

⁴³ See *infra* Part III.A.

⁴⁴ Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000).

those choices indeed create policy feedbacks that shape to some degree each of the inputs into politics.

Framed in this way, the fear that the self-governance interest precludes protection for individual expression and autonomy—for example, for the arts—is clearly overstated. Individual autonomy has long been recognized as a prerequisite for the independence necessary for a functioning liberal democracy.⁴⁵ As Justice Kennedy is disposed to explain, our constitutional order “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” and provides for “a realm of personal liberty which the government may not enter.”⁴⁶

Exactly how capacious the self-governance interest could be is a conversation for another time. For now, it suffices to say that any reasonable articulation of the self-governance interest would provide ample justification for protecting artistic expression, perhaps even private journals.⁴⁷ To the degree that speech and expressive conduct are often central media through which to express “personal dignity and autonomy,”⁴⁸ it follows that speech that is central to the “defin[ition of] one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” warrants First Amendment protection because such “[b]eliefs . . . define the attributes of personhood.”⁴⁹ Protection would turn on the centrality of particular expression to *the requisite individual autonomy and freedom of conscience necessary for democratic citizenship*, not on whether the expression has direct value to democratic debate and participation.⁵⁰

III. RECONCEIVING FIRST AMENDMENT BOUNDARIES AND PROTECTIONS

The self-governance interest, unlike its competitors, offers a historically grounded and theoretically principled account of the limits to First Amendment rights. By providing both a measure with which to assess the appropriate reach of the First Amendment and an intratextual set of considerations that ought to inform doctrinal choices regarding levels of individual protection, it offers a path back from the libertarian precipice to which the Roberts Court has taken the doctrine.

⁴⁵ See Meiklejohn, *supra* note 42, at 263.

⁴⁶ *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

⁴⁷ See Bhagwat, *supra* note 4, at 855.

⁴⁸ *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

⁴⁹ *Casey*, 505 U.S. at 851.

⁵⁰ See, e.g., *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, No. C 15-01007 JSW, 2016 WL 1258638, at *3–6 (N.D. Cal. Mar. 31, 2016) (refusing to draw on *Lawrence v. Texas* to find that California’s criminalization of prostitution and its ban on solicitation infringed the freedom of association and freedom of speech, respectively).

The First Amendment establishes a defined set of individual rights in order to secure a set of conditions understood to be necessary for self-governance. It follows *a fortiori* that individual rights under the Amendment cannot be so extensive as to undermine either the larger project of self-governance or the very preconditions protected by the co-equal rights secured under the Amendment.

Measured by these standards, the Roberts Court's expansive First Amendment jurisprudence has been a colossal failure. By signaling a strong presumption of coverage for anything that arguably could be considered speech in everyday English, legislation once understood to be well within the bounds of democratic decision-making—such as rules adopted to govern economic markets—has been recast as potentially violating individual speech rights and thus beyond legislative competence.⁵¹ The result has been a well-documented explosion of First Amendment challenges to what used to be considered mundane tools of economic regulation, including compelled disclosures, liability for disseminating misinformation, and standard setting for licensed professionals.⁵² At the same time, the level of protection in certain long-standing domains of First Amendment coverage has been significantly beefed up, frequently by decisions only barely tethered to the traditional rationales of First Amendment protection.⁵³

The consequences for our democracy are dire: policymakers are increasingly hamstrung in their regulatory choices even as the Court is busy undermining collective political practices protected by other aspects of the Amendment, most prominently unionism.

A. *Preserving Contested Spaces of Self-Governance*

While the First Amendment restricts certain types of legislative actions (for example, advance censorship of the press), these restrictions are established to maintain the integrity of the policy space our constitutions grant to legislatures—not to undercut that policy space. Each provision is in place to ensure responsiveness and to prevent entrenchment, whether of individuals, parties, or viewpoints. The freedom of the press and speech are protected in

⁵¹ Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1624 (2015) (noting that, in a series of recent cases, the Court has shunned efforts to extend the concept of low-value speech and that this has been taken to signal “a strong presumption of [First Amendment] coverage”).

⁵² *Id.* at 1614–16; Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016). *Contra* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335, 354–56 (2017) (“Even when the First Amendment applies, it leaves many regulatory regimes affecting speech unscathed.”).

⁵³ *See* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (critiquing the majority's approach as blunt insofar as it fails to tailor the application of strict scrutiny to facially content-based regulations of speech to the “rationales” that underpin First Amendment caselaw).

order to ensure an open debate leading up to both elections and legislative votes.⁵⁴ The freedom of assembly and the right of association afford American citizens the opportunity to take collective action to shape both electoral and legislative outcomes.⁵⁵

Insofar as the Amendment was established to maintain the constitutionally provided space for self-governance, difficult questions pertaining to the scope of First Amendment rights are more easily resolved when recast in the register of separation of powers. The text's prohibition on "abridging the freedom of speech"⁵⁶ is not self-explicating. It falls to the judiciary to determine when the proviso is implicated. When considering brash First Amendment claims, judges ought to refrain from reaching decisions that constitutionalize choices delegated in our system of government to the democratic process.⁵⁷

First Amendment rights must be adjudicated pursuant to doctrinal rules attendant to preserving the capacity of legislatures to serve their most basic constitutional function—reaching provisional decisions after deliberation about contested values. This requires *both* that judicial interpretations prevent government officials from interfering with the processes and domains that ensure that outputs of the democratic process are responsive to popular will and that elected officials can be replaced as necessary, *and* that judicial interpretations do not oust legislatures from their central constitutional function.

No doubt some will be inclined to object that this framing effectively nullifies the First Amendment. To the degree that moral regulation, health and safety regulation, education, and poor and elderly relief—no less than economic regulation—are quintessentially legislative judgments, what is left in the First Amendment's domain?

While descriptively, this point is unquestionably right, its implied conclusion misses the mark. The default rule in a republican form of government is that policy choices are reserved for the legislature. The proper question, therefore, is not what is *within* the legislative domain, but rather how do we decide what has been *excluded* from the legislative domain. This reframing radically simplifies the inquiry. First, there are those substantive legislative choices that the Constitution affirmatively removes from legislative consideration.⁵⁸ The Reconstruction Amendments provide the clearest illustrations. The Thirteenth Amendment forbids legislatures from creating an

⁵⁴ Bhagwat, *supra* note 6, at 1103–04.

⁵⁵ Abu El-Haj, *All Assemble*, *supra* note 26, at 1030–32; Bhagwat, *supra* note 19, at 1106.

⁵⁶ U.S. CONST. amend. I.

⁵⁷ For an instance where three Justices acknowledge the importance of separation of powers in this setting, see *United States v. Alvarez*, 567 U.S. 709, 754 (2012) (Alito, J., dissenting).

⁵⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").

economy based on slavery, whatever its economic efficiencies.⁵⁹ The Fourteenth Amendment creates a precommitment to civil equality, the precise scope of which remains contested.⁶⁰ Second, beyond these substantive precommitments, the very structure of the republican project precludes legislatures from insulating themselves from political challenge.⁶¹ Efforts to entrench, directly or indirectly, either officials, parties, or policies constitute a constitutional foul.⁶²

The fallacy driving the Roberts Court's expansive First Amendment doctrine is its assumption that the Amendment falls into the first category—that it provides a substantive injunction on speech regulation,⁶³ not unlike the Constitution's prohibition on the quartering of soldiers⁶⁴ or the suspension of habeas corpus.⁶⁵ Under current First Amendment doctrine, for example, “speech proposing a commercial transaction” is simply presumed to raise First Amendment concerns.⁶⁶ As a result, regulations that place restrictions on

⁵⁹ U.S. CONST. amend. XIII.

⁶⁰ U.S. CONST. amend. XIV. Certain provisions of the original Constitution function similarly. *See, e.g.*, U.S. CONST. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. No Bill of Attainder or ex post facto Law shall be passed. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . .”).

⁶¹ *Cf. Carolene Prods. Co.*, 304 U.S. at 152 n.4 (speculating that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [ought] to be subjected to more exacting judicial scrutiny” and offering as examples “restrictions upon the right to vote, . . . restraints upon the dissemination of information, . . . interferences with political organizations, [and] prohibition[s] of peaceable assembly”).

⁶² *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) (objecting that “the amendment imposes a special disability upon . . . [h]omosexuals [by] forbid[ding them] the safeguards that others enjoy” insofar as “[t]hey can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution”); *Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (arguing that judicial intervention “into so delicate a field” was appropriate only because “the majority of the people of Tennessee have no ‘practical opportunities for exerting their political weight at the polls’ to correct” the egregious legislative malapportionment (quoting *MacDougall v. Green*, 335 U.S. 281, 284 (1948) (per curiam))).

⁶³ In this regard, it is arguably relevant that the text does not prohibit the regulation of speech per se, but rather the making of laws that “abridge[] the *freedom of speech*.” U.S. CONST. amend. I (emphasis added).

⁶⁴ U.S. CONST. amend. III.

⁶⁵ U.S. CONST. art. I, § 9, cl. 2.

⁶⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, 650–51 (1985) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–63 (1980) (quoting *Ohralik*, 436 U.S. at 456); *see also* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 28–30 (D.C. Cir. 2014) (en banc) (Rogers, J., concurring) (explaining why First Amendment doctrine distinguishes between commercial disclosure requirements, governed by *Zauderer*, and regulations that

commercial advertising, but also those that impose disclosure requirements, are subject to relatively searching scrutiny.

The First Amendment is better understood, however, as an effort to make explicit the structural point that a republican form of government requires a functioning democratic process. Efforts to restrict the press, public discourse, or peaceable assemblies as well as the regulation of civic associations, political parties, and elections are presumed unconstitutional. But this is not because the Amendment has taken a particular set of choices off the legislative agenda, so much as because it guarantees that all options are available for public consideration. In order for democratic outputs to reflect popular will, and to ensure that elected officials can be ousted when they do not, courts must enjoin government interference with these political and cultural processes and domains.

While exploring the full doctrinal implications of this reframing is beyond the scope of a symposium piece, its basic contours can be discerned by reconsidering First Amendment challenges to what were, until recently, understood to be run-of-the-mill market regulations.

A doctrine attendant to balancing the First Amendment's prohibition on political entrenchment with a vindication of positive liberty in the legislature would maintain the presumption of constitutionality with respect to economic regulation, even when speech is implicated.⁶⁷ Any other approach risks significantly undermining our constitutional commitment to leave contested economic policy choices to the legislature. As with the New Deal Court's rejection of *Lochner*, the scaling back of First Amendment rights flows from the momentous value of the positive liberties at stake rather than from a determination that "the personal liberties at issue [are] unimportant."⁶⁸

Regulating economic markets, whether in the form of workers' rights, consumer protection, or securities regulation, is a quintessential legislative prerogative. The ability of "elected officials . . . to set the rules for the economy and establish its boundaries" is, as Deborah Hellman notes, the very

burden commercial speech, governed by *Central Hudson*, in an effort to push back on the invitation to collapse the two doctrines).

⁶⁷ Cf. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–87 (1955) ("The . . . law [at issue] may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise or improvident, of out of harmony with a particular school of thought.").

⁶⁸ Hellman, *supra* note 13, at 234–35 (arguing that "[r]ather than focusing on the relative vulnerability of the negative liberty infringed, perhaps we should focus on the significance of the positive liberty that is exercised" and, as such, "the cases of the *Lochner* era were properly rejected not because the personal liberties at issue were unimportant . . . but instead because the liberty of self-government at stake was so momentous"); see also *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 589 (Rehnquist, J., dissenting) (recognizing that the Court's development of the commercial speech doctrine was reopening *Lochner*'s Pandora's box).

essence of the positive liberty of self-governance.⁶⁹ In the contemporary era, information regulation is not only an accepted, but a preferred, tool in the repertoire of light-touch regulatory approaches. Markets can only achieve allocative efficiency if consumers are informed. In the absence of information regulation, consumers in many markets face an array of obstacles when it comes to securing optimal information, resulting in various collective action problems.⁷⁰

Not surprisingly, economic legislation today frequently involves the regulation of speech. The government frequently requires manufacturers of products, from cigarettes and pharmaceuticals to securities and meat, to provide consumers with information and to disclose risk.⁷¹ Employers are routinely asked to provide information to employees about their statutory rights,⁷² and corporations are regularly forced to disclose their financials and other information material to investors.⁷³ Legislatures also often restrict the marketing practices of firms.⁷⁴

A presumption of constitutionality for each of these laws, all of which can reasonably be characterized as regulations of commerce, would derive from the recognition that markets can be regulated in many ways, and that legislatures are the appropriate forum for determining not just the ends of regulation, but also the means of achieving those goals.⁷⁵ Compelled disclosure of information to enhance market efficiency or public safety, for instance, would be presumptively constitutional, not because it does not involve speech that could contribute to public discourse, but because information regulation—whether in the form of a prohibition on false and misleading information or a demand for truthful disclosure—is a critical regulatory tool.⁷⁶

⁶⁹ Hellman, *supra* note 13, at 233–34 (“The regulation of the economy is a central aspect of self-government.”).

⁷⁰ *E.g.*, Christopher Robertson, *The Tip of the Iceberg: A First Amendment Right To Promote Drugs Off-Label*, 78 OHIO ST. L.J. 1019, 1045–46 (2017) (noting the collective action problems the public would face determining the safety of drugs in the absence of the Food Drug & Cosmetics Act’s premarket requirement that drugmakers provide evidence of the safety and efficacy of drugs).

⁷¹ *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77d-1(b)–(d) (2012) (setting securities disclosure requirements for certain small transactions); Food, Drug and Cosmetics Act, 21 U.S.C. § 352 (2012) (defining drug labeling requirements); 9 C.F.R. § 317.1–.2 (2011) (outlining labeling requirements for meat products).

⁷² *E.g.*, 29 C.F.R. § 1903.2 (2009) (requiring employers to post notices informing employees of their rights under the Williams-Steiger Occupational Safety and Health Act of 1970.)

⁷³ *E.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a–77h (2012).

⁷⁴ *E.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 45–58 (2012).

⁷⁵ *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994).

⁷⁶ *See* Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 24 (D.C. Cir. 2014) (upholding disclosure requirements against compelled speech challenge in recognition,

Many of the Court's commercial speech cases appear misguided in this light. The Court's recent decision in *Expressions Hair Design v. Schneiderman*, for example, would come out differently.⁷⁷ To the degree that New York is permitted to prefer credit card transactions over cash transactions, why should it be hamstrung in its efforts to utilize the lessons of behavioral psychology, which show that individuals react more strongly to surcharges than discounts, in its efforts to ensure that credit card customers are not penalized for refusing to pay cash?⁷⁸ The critical point is that the legislative prerogative extends to both legislative ends and means. The fact, therefore, that New York's law "is not like a typical price regulation," insofar as it chooses to "regulate . . . how sellers may communicate their prices," does not change the fundamental economic character of the law.⁷⁹

The same is true for cigarette advertising.⁸⁰ To the degree that it is within the legislative power to ban cigarettes for any nonarbitrary reason, it should also be within its power to ban the advertisement of cigarettes (or to do so only near schools in an effort to protect children from forming an addiction).⁸¹ Advertising is central to the economic viability of a business; as such, the regulation of advertising is a quintessential form of market regulation.

Notice how this approach differs significantly from traditional approaches to determining levels of scrutiny in First Amendment law. Nothing turns here on whether the rights bearer is "speaking" in some colloquial sense or on the relative value of that speech.⁸² It does not deny that commercial speech can

among other things, of the governmental interest in "enabling customers to make informed choices").

⁷⁷ *Cf. Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1151 (2017) (remanding to lower court, having determined that the regulation was in fact a regulation of speech, and not conduct, to determine in the first instance whether to apply *Central Hudson* or *Zauderer*).

⁷⁸ *See id.* at 1155 (Sotomayor, J., concurring).

⁷⁹ *Id.* at 1150–51 (majority opinion).

⁸⁰ *But see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

⁸¹ This was the Supreme Court's position early on with respect to commercial advertising. *E.g.*, *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345–46 (1986) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . .").

⁸² *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) ("We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devaluation, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (emphasis added) (citations omitted)).

have a political valiance or that commercial activities often have expressive elements.⁸³

The presumption of constitutionality follows from the fact that economic regulation *is* the domain of politics—the domain of political *outputs*—and from a worry that to proceed as if all speech was within “the freedom of speech” is to significantly undermine the republican project for which the likes of Patrick Henry and John Stark fought.⁸⁴ The doctrinal task is to respect this tension by providing both robust and confined First Amendment rights. Official efforts to compromise *political inputs*, broadly construed, must be struck down to underwrite the legitimacy of the products of the political domain, but the resulting First Amendment rights must not be so great as to remove contested and contestable economic and moral choices from our democratic institutions.

The line between regulatory outputs and political inputs, to be sure, is not always bright. Economic regulation that explicitly targets speech arguably distorts political debate and thus implicates political *inputs*.⁸⁵ Some vehemently argue, for instance, that the Food and Drug Administration’s (FDA) restrictions on nutritional labeling influence the current political controversy over nutrition by framing sugars as “bad food”⁸⁶ or by glossing over distinctions between good and bad fat.⁸⁷ Similarly, the FDA’s effort to discourage off-label promotion by pharmaceutical representatives arguably shapes the debate about the value of off-label prescribing.⁸⁸

Regardless of whether one finds these particular examples persuasive, the doctrine clearly needs a mechanism for reversing the default presumption in instances where economic regulation targeting speech substantially

⁸³ Samuel R. Bagenstos, Essay, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 STAN. L. REV. 1205, 1231–32 (2014); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139–40 (2000); *see also, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 137 S. Ct. 2290 (2017); Elaine Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013). *But see* Washington v. Arlene’s Flowers, Inc., 389 P.3d 543, 556–57 (Wash. 2017) (noting that commercial sale of goods or services is not presumptively expressive).

⁸⁴ *See supra*, notes 11, 14 and accompanying text.

⁸⁵ *See* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 407–12 (2014) (offering a range of examples where run-of-the-mill government regulation arguably influences the marketplace of ideas by “shaping, prohibiting, or outright compelling speech”).

⁸⁶ *See, e.g.*, Sherzod Abdukadirov, *The FDA Overreaches with New Food Label*, HILL (Mar. 5, 2015), <http://thehill.com/blogs/pundits-blog/healthcare/234580-the-fda-overreaches-with-new-food-label> [<https://perma.cc/843B-VL6A>].

⁸⁷ *See, e.g.*, Allison Aubrey, *Why the FDA Is Re-Evaluating the Nutty Definition of “Healthy” Food*, NPR (May 10, 2016), <https://www.npr.org/sections/thesalt/2016/05/10/477514200/why-the-fda-is-reevaluating-the-nutty-definition-of-healthy-food> [<https://perma.cc/NP9W-NE99>].

⁸⁸ *See* Robertson, *supra* note 70, at 1020–25.

compromises political inputs. Equal Protection doctrine already recognizes this need for analogous reasons.⁸⁹

The public forum's time, place, and manner doctrine could easily be adapted to this end. Currently, it operates to reverse the default presumption of unconstitutionality with respect to government regulation of public spaces long central to cultural and political democracy.⁹⁰ Equally significantly, it does so out of respect for the legislative prerogative to maintain order.⁹¹ The doctrine, in other words, already polices the same boundary—distinguishing between the legislature's constitutional prerogative to pass civil and criminal laws genuinely related to order maintenance and the constitutional prohibition on attempts to undermine political responsiveness or electoral accountability. The government's right to regulate public forums in the interest of order maintenance is recognized so long as two critical conditions are met—the regulation is viewpoint neutral and adequate alternative means for expression are available.⁹² Each of these conditions serves to guarantee that the regulation is not an illicit effort to quash public discourse or assembly.

The time, place, and, manner doctrine suggests that the presumption of constitutionality for economic regulation should be reversed only when disgruntled regulated parties lack adequate alternative means with which to persuade the government to change course. Economic policy is inevitably not viewpoint neutral. Thus, the traditional requirement of viewpoint neutrality does not translate well into this new context. The requirement of viewpoint neutrality only makes sense where the government seeks special dispensation to undertake the inherently suspect project of regulating quintessential democratic spaces.⁹³ By contrast, the very reason for requiring policymaking

⁸⁹U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that notwithstanding the presumption of constitutionality for non-suspect classifications, the constitutional obligation to prove “‘equal protection of the laws’ . . . must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest”).

⁹⁰Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (observing that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” but holding that this privilege “is not absolute”).

⁹¹*Id.* at 515–16 (explaining further that “[t]he privilege of a citizen . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied”).

⁹²Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that reasonable time, place, and manner restrictions are constitutional “in a public forum” so long as they were not “adopted . . . because of disagreement with the message it convey[ed]” and “they leave open ample alternative channels for communication” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

⁹³Even *R.A.V. v. City of St. Paul* is not to the contrary. 505 U.S. 377 (1992). Notwithstanding its bold proclamation that the state may never regulate speech “based on

to go through a majoritarian process in a liberal democracy is to legitimate such partiality.

As in Equal Protection doctrine, reversal would be the exception, not the rule. The First Amendment has never demanded an unfettered right to speak. Even political speakers are regularly burdened by the requirement to gather at more convenient locations and less disruptive times, to lower their microphones, and to limit the contributions they give and accept.⁹⁴ These burdens on the time, place, and manner of speech, assembly, and association do not constitute constitutional fouls, even where they diminish opportunities for expression.

The proper course for those disgruntled with particular disclosure regimes or pricing preferences is more politics—speech, association, assembly, and voting. Thus, even an outright prohibition on off-label promotion by pharmaceutical representatives and their agents (such as doctors remunerated for their advocacy), with or without a prohibition of off-label prescribing, would likely meet the proposed test.⁹⁵ Pharmaceutical companies are free to

hostility—or favoritism—towards the underlying message expressed,” even in *R.A.V.* Justice Scalia includes a lengthy discussion of exceptions to this broad statement. *See id.* at 386, 388, 390 (concluding that “it may not even be necessary to identify any particular ‘neutral’ basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot”). More importantly, *R.A.V.* should not be viewed as a case involving the regulation of unprotected fighting words, notwithstanding the Court’s framing. *R.A.V.*’s holding (like that in *Texas v. Johnson*, 491 U.S. 397 (1989)) makes much more sense when one acknowledges that the central question in the case was whether the assembly was constitutionally protected or unlawful. *R.A.V.* involved a group of teenagers that burned a cross in the yard of one of their neighbors, a black family. 505 U.S. at 379. Likewise, *Johnson* burned the flag while protesting at the 1984 Republican National Convention in Dallas. *Johnson*, 491 U.S. at 399. Both cases, in other words, are instances where the state sought to render certain assemblies per se unlawful. While mobs are not constitutionally protected, there is no question that it would be problematic to defer to the government on the line between a criminal mob and a constitutionally protected assembly insofar as this involves direct regulation of an explicitly protected channel of democratic politics—let alone to permit viewpoint-based discrimination in making that determination.

⁹⁴ *E.g.*, *Ward*, 491 U.S. at 784 (upholding New York City’s “attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity”); *Buckley v. Valeo*, 421 U.S. 1, 23–38 (1976) (upholding congressional effort to limit campaign contributions to candidates and political parties); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding a municipal requirement that processions obtain a license, as a constitutional regulation of the time, place, and manner of public assembly, where official discretion was sufficiently circumscribed)); *see also* *Grayned v. City of Rockford*, 408 U.S. 104, 121 (1972).

⁹⁵ *But cf.* *United States v. Caronia*, 703 F.3d 149, 168 (2d Cir. 2012) (“constru[ing] the misbranding provisions of the FDCA as not prohibiting and criminalizing . . . truthful off-label promotion of FDA-approved prescription drugs” in light of First Amendment concerns); *accord* *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557 (2011) (asserting that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment” and proceeding to analyze the restriction as a

lobby the FDA to change its policies with respect to off-label promotion, and more broadly to the very requirement of premarket FDA approval. They are able to raise their complaints in Congress should the FDA be unreceptive, and they can certainly engage in an issue campaign to persuade the public of the benefits of off-label prescribing (including with specific examples). Pharmaceutical companies and their allies in the foundation world can fund research and publications on the benefits of off-label prescribing,⁹⁶ and allied doctors can speak in their private capacities to the issue. The only thing an off-label promotion ban precludes is ostensibly truthful dissembling regarding the merits of off-label prescribing during sales pitches for specific drugs targeted at doctors or patients.⁹⁷ By contrast, the application of California's prohibitions against false and misleading advertising to "Nike's press releases and letters to newspaper editors . . . addressed to the public generally"⁹⁸ likely warranted a reversal of the presumption of constitutionality, insofar as it burdened Nike's ability to effectively respond to public allegations that the company's overseas factories routinely violated workers' rights.⁹⁹

The harder cases are those involving regulations that defy easy categorization. Consider first, *First National Bank v. Bellotti*, which involved a challenge to a Massachusetts statute that prohibited banks and certain other business corporations from making expenditures in relation to ballot measures.¹⁰⁰ While most of us are likely to view this statute as regulating electoral politics, Justice White argued, in dissent, that it ought to be viewed

content- and speaker-based restriction subject to strict scrutiny). In fact, it is precisely because there are good reasons to permit doctors to prescribe off-label that the FDA should be permitted to discourage off-label promotion to offset zealous and reckless advertising, without having to prohibit physicians from using their professional discretion in prescribing. For the policy benefits associated with permitting off-label prescribing and the difficulties of producing requisite studies for certain populations (pregnant women, children, and individuals with aggressive cancers), see *Amarin Pharma, Inc. v. U.S. FDA*, 119 F. Supp. 3d 196, 200–03 (S.D.N.Y. 2015) (involving off-label promotion of uses for which Amarin specifically failed to receive FDA approval).

⁹⁶ Under current law, pharmaceutical companies' ability to "disseminat[e] . . . off-label information through scientific journals" is explicitly recognized by the FDA. *Caronia*, 703 F.3d at 166–67.

⁹⁷ False or misleading representations about off-label usages are prohibited and are "not entitled to First Amendment protection." *Id.* at 165 n.10. *But cf.* *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (holding the Stolen Valor Act of 2005 ran afoul of the First Amendment insofar as it criminalized false statements about military honors received).

⁹⁸ *Kasky v. Nike, Inc.*, 45 P.3d 243, 258 (Cal. 2002).

⁹⁹ This point was made clearly by the dissent. *Id.* at 263 (Chin, J., dissenting). Under current doctrine, the inclusion of public issue advocacy does not inoculate speech proposing a commercial transaction from the more lenient *Central Hudson* test. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 & n.7 (1985) (noting that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980))).

¹⁰⁰ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767–68 (1978).

as an innocuous effort to restrict corporate waste.¹⁰¹ As a theoretical matter, at least, this characterization was not entirely implausible. Most corporate law seeks to prevent corporate managers from using corporate funds for personal gain or indulgences, and the law in question provided an exception for ballot measures “materially affecting any of the property, business or assets of the corporation.”¹⁰² Even so, the opportunities for entrenchment associated with efforts to regulate the financing of elections cautions in favor of a bright-line rule that all efforts to regulate elections be met with a presumption of unconstitutionality.

Consider next laws that prevent public accommodations from discriminating. On the one hand, the legislative prerogative to regulate markets is clear and includes the authority to predicate eligibility to participate in the market on any number of conditions—from the agreement to pay a fair wage to an openness to contract with individuals regardless of race, sex, political affiliation, pregnancy status, or sexual orientation.¹⁰³ On the other hand, anti-discrimination laws reflect, but also entrench, a particular set of values, and in the context of civil society, this distorts, possibly intentionally, political inputs. The pertinent question regarding which presumption to apply at the outset, in other words, turns on whether such public accommodation laws are best understood as regulating an economic transaction or as imposing liberal values of tolerance. The former would give rise to the presumption of constitutionality while the latter would trigger strict scrutiny insofar as it seeks to impose a particular worldview on civil society. The answer will depend on context.¹⁰⁴ Notice, however, that nothing would turn on drawing a line

¹⁰¹ *Id.* at 812–13 (White, J., dissenting) (“Massachusetts has chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issue on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.”).

¹⁰² *Id.* at 768 (majority opinion).

¹⁰³ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring) (“The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.”).

¹⁰⁴ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.* offers the easiest of these cases insofar as it involved the application of a public accommodation law to a traditional form of peaceably assembly. 515 U.S. 557, 559 (1995). Parades have long been a central tradition of American politics, including ethnic politics starting in the nineteenth century, and thus are squarely within the public domain. As with campaign finance, therefore, there are good reasons to be skeptical of official efforts to shape them and the presumption of unconstitutionality should apply.

between economic and expressive associations—a distinction that has rightly been criticized as unstable.¹⁰⁵

The fact, however, that there will be difficult cases ought not distract from the fact that this account brings clarity to many core cases. The self-governance interest explains why there ought to be a strong presumption of constitutionality when it comes to economic regulation. A statute that prevents businesses from discriminating in the hiring, firing, and promotion of employees is clearly commercial legislation. An FDA regulation that requires all over-the-counter drugs or all food produced in a factory to include a label with information about the ingredients and calorie counts is clearly market regulation aimed to compensate for consumers' struggles to acquire needed information, regardless of whether the act of labeling is compelling speech. Similarly, regulations seeking to remedy inequalities in access to information, for instance by prohibiting employers from lying or making misrepresentations to their workers about their statutory rights or other employment conditions, are clearly regulations of employment contracting and ought to be presumed constitutional.¹⁰⁶

Absent a normative belief in First Amendment absolutism, the self-governance rationale is theoretically optimal even as it does not eradicate the boundary questions that plague the doctrine. The line between economic regulation and the political process is not always bright. But no account of the First Amendment obviates the need for line drawing. Even the libertarian First Amendment's plain language speech test does not entirely avoid the need to draw lines.¹⁰⁷ The self-governance interest, at least, enables us to draw limits

¹⁰⁵ *U.S. Jaycees*, 468 U.S. at 634–35 (O'Connor, J., concurring) (arguing that the freedom of association only extends to those associations whose predominant purpose is expressive rather than commercial).

¹⁰⁶ *But see Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959–63 (D.C. Cir. 2013) (holding that while employers' right to silence is "sharply constrained" in the labor context, employers do not entirely forfeit that right), *overruled in part on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014). *See generally* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 38–39 (2016) (explaining that employer speech does not cleanly fit within existing First Amendment theories, but proposing that the First Amendment authorizes the government to "require employers to disclose objectively verifiable information about workers' rights and . . . working conditions, as well as to prohibit employer lies and misrepresentations about these matters that threaten to coerce or manipulate workers' choices").

¹⁰⁷ *Compare Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) ("When the government seeks to regulate those activities, it is often wiser not to try to distinguish between 'speech' and 'conduct.' Instead, we can, and normally do, simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects." (citation omitted)), *with id.* at 1150–51 (majority opinion) (attempting to clarify that "a law requiring all New York delis to charge \$10 for their sandwiches . . . would regulate the sandwich seller's conduct" despite the fact that it would require "a store . . . to put '\$10 on its menus or have its employees tell customers that

in ways that the competing theoretical foundations for the freedom of speech cannot. That said, there is clearly much more theorizing to be done, especially with respect to the noneconomic domains of self-governance such as order maintenance and moral regulation where the risks of entrenchment may be greater.¹⁰⁸

B. *Freedom of Speech and the Cognate First Amendment Rights*

A properly theorized self-governance interest, one grounded in the First Amendment as a whole, rather than the Free Speech Clause in isolation, offers a new vantage point from which to consider when, where, and why it might be appropriate to limit individual free speech rights. The basic insight is a simple one: the freedom of speech is neither the only nor the primary condition necessary for self-governance that the First Amendment protects; therefore, individual free speech rights cannot be so great as to undermine the other constitutionally protected prerequisites of self-governance, either directly or indirectly. Where First Amendment “interests lie on both sides of the legal equation,” courts must balance free speech rights against these other interests.¹⁰⁹

First Amendment doctrine and scholarship have succumbed to an unfortunately naïve account of the processes of self-governance in which the marketplace of ideas has been given an outsized role. Achieving representative government, especially with respect to policy outputs, is much harder in practice than in theory. Even where public discourse is unencumbered, myriad obstacles stand in the way of achieving responsive, responsible, and accountable political bodies. For one, citizens, as individuals, are busy,

price” because “the law’s effect on speech would be only incidental to its primary effect on conduct”).

¹⁰⁸ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (holding California’s effort to prohibit the sale or rental of violent video games to minors ran afoul of the First Amendment because, *inter alia*, “video games communicate ideas—and even social messages—through many familiar literary devices . . . and through features distinctive to the medium (such as the player’s interaction with the virtual world)”); *United States v. Stevens*, 559 U.S. 460, 475–76, 481–82 (2010) (holding that a federal statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and thus facially invalid under the First Amendment, especially as depictions of conduct lawful in one state could constitute illegal depictions in another state); *New York v. Ferber*, 458 U.S. 747, 773–74 (1982) (upholding New York’s effort to criminalize the distribution of child pornography, notwithstanding that the statute did not require proof of obscenity, on the grounds that the state had a compelling interest in preventing sexual exploitation of minors and protecting children from the mental, physical, and sexual abuse associated with pornography).

¹⁰⁹ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[W]here constitutionally protected interests lie on both sides of the legal equation . . . there is no place for a strong presumption against constitutionality.”).

distracted, and find it virtually impossible to effectively monitor what their elected officials are actually doing on the job.

The critical role played by civic associations, including political parties, in offsetting these obstacles, especially when it comes to achieving policy responsiveness, is significantly underappreciated.¹¹⁰ Current doctrine, for example, recognizes only the importance of civic associations as speakers.¹¹¹ But associations do much more than represent views in our democracy. They draw citizens into politics through social ties; they reflect, shape, and represent preferences; and they resolve collective action problems associated with keeping informed about politics.¹¹²

The absolutist trajectory of free speech protection threatens to undermine the strength of American civic associations and as a consequence, the informed political participation that is required for democratic accountability. And it does so despite the fact that the First Amendment squarely protects both interests—facilitating a robust marketplace of civic associations and facilitating informed political participation—through the right of peaceable assembly and the freedom of association.

Yet, this dynamic is entirely obscured by the salient approaches to theorizing levels of free speech protection. To illustrate this phenomenon wherein the expansion of individual free speech rights has, substantially and predictably, undermined existing civic associations, and in turn, their ability to foster democratic accountability, let us revisit the Roberts Court's receptiveness to individuals' compelled speech claims against the state-sanctioned practices of unions.

First Amendment challenges to union practices have been on the rise. One line of attack has been on those state laws that require nonunion members, who benefit from the union's collective bargaining efforts, to pay their fair share of the associated costs.¹¹³ Typically, in these cases, state law authorizes what are known as "agency shops."¹¹⁴ Under an agency shop arrangement, individuals may maintain employment while refusing to join the union or pay

¹¹⁰ See Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1132, 1154–60 (2016); Bhagwat, *supra* note 6, at 1109.

¹¹¹ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (explaining that the "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association").

¹¹² See Abu El-Haj, *supra* note 28, at 76–98 (reviewing the empirical literature on civic associations and summarizing its lessons regarding the dynamics of self-governance).

¹¹³ Currently, there are twenty-eight so-called "right to work" states in the country, which prevent unions from requiring nonmember employees to contribute their share to cover joint costs. *Right To Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND. (2017), <http://www.nrtw.org/right-to-work-states/> [<https://perma.cc/P6G3-ZJ8R>].

¹¹⁴ See J. Michael Guenther, *Labor Law—Union Security—The Agency Shop and State Right-To-Work Laws*, 35 NOTRE DAME L. REV. 547, 547 (1960).

for its political activity; all employees, however, are required to pay a fair-share service fee for representation in collective bargaining.¹¹⁵

While the constitutionality of such fair-share service fee requirements has long been settled,¹¹⁶ a series of recent opinions, authored by Justice Alito, have invited renewed challenges to such provisions, on the grounds that the payment of such fees constitutes compelled speech in support of unionism.¹¹⁷

Existing Supreme Court precedent views the matter differently. *Abood v. Detroit Board of Education* (1977) held that although it would be unconstitutional to compel nonunion members to pay fees to cover political and ideological projects, there is nothing constitutionally suspect about requiring nonmember employees to pay for services related to collective bargaining over terms and conditions of employment.¹¹⁸ In essence, *Abood* created a distinction, for First Amendment purposes, between unions as *associations of employees* (and therefore of employment-related advocacy) and unions as *civic associations* (and their related political advocacy).

Recent challenges to compelled fair-share service fees challenge this distinction between unions, as economic actors that bargain, and unions, as civic associations that engage in political speech.¹¹⁹ Collective bargaining relating to terms and conditions of employment in the public sector, they claim, “is inherently ‘political.’”¹²⁰ It is materially indistinguishable from lobbying; therefore, requiring nonunion employees to pay a fair-share service fee to a public union constitutes compelled subsidization of ideological speech.

Abood’s central holding, however, is sound, exemplifying exactly the sort of balance between the freedom of speech and the freedom of association that a self-governance interest grounded in the First Amendment as a whole, rather than the free speech clause in isolation, demands. Under *Abood*, the nonunion employee’s right to oppose unionism is fully preserved.¹²¹ She is free to refuse to join the union (qua civic association) and free to refuse to subsidize its

¹¹⁵ *Id.*

¹¹⁶ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

¹¹⁷ See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 311 (2012); see also *Friedrichs v. Cal. Teachers Ass’n*, No. 13–57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014), *aff’d*, 136 S. Ct. 1083 (2016) (per curiam) (affirmed by default pursuant to a four-four split).

¹¹⁸ *Abood*, 431 U.S. at 235–36.

¹¹⁹ See, e.g., *Janus v. Am. Fed’n of State, Cty., and Mun. Emps. Council 31*, 851 F.3d 746, 746–47 (7th Cir. 2017), *cert. granted*, 2017 WL 2483128 (Sept. 28, 2017) (seeking the overruling of *Abood*).

¹²⁰ *Abood*, 431 U.S. at 227.

¹²¹ *Id.* at 230.

political speech.¹²² She is also free to join civic and political associations that oppose unionism.¹²³ As *Abood* explained,

A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing. . . . [Moreover,] public employees are free to participate in the full range of political activities open to other citizens.¹²⁴

At the same time, *Abood* preserves unions and the second-order benefits to democratic accountability that arise from them as civic associations.¹²⁵ This is not because it falsely props up union membership, or subsidizes the union's political speech, but rather because it prevents the significant collective action dilemmas that would arise under a more expansive account of individual free speech rights.

Any decision expanding the compelled speech doctrine to protect nonunion members from being required to pay a fair-share service fee, by contrast, would lead quickly into the tragedy of the commons: *prounion* workers might make the economically rational decision to withhold their fees, hoping that others will fund the union, but rapidly undermining it. By upholding the constitutionality of the agency shop and fair-share service fees, *Abood* ensures that no one has an opportunity to free ride.¹²⁶ Both union and nonunion employees are required to pay their fair share of the employment-related representation the union has a duty to provide on an equal basis.

Justice Alito is correct that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections."¹²⁷ What he fails to recognize is that First Amendment interests lay on both sides of this conflict, and it is this that gives constitutional significance to the free-rider argument. Compelled fair-share service fees are necessary to counteract the very real free-rider problem that would arise *among members* and undermine unions in their absence.

The First Amendment not only establishes an open marketplace of ideas, but also an open marketplace in civic associations. *Abood* allows both postulates to be respected: freeing nonunion members from compelled association with the union or compelled political contributions facilitates the

¹²² *Id.* at 235–36; see also, e.g., *Janus*, 851 F.3d at 748 (allowing public employee to donate to the charity of his choice in lieu of paying fair-share service fee to union).

¹²³ See *Abood*, 431 U.S. at 230.

¹²⁴ *Id.*

¹²⁵ See *Abu El-Haj*, *supra* note 28, at 81.

¹²⁶ *Abood*, 431 U.S. at 222 (upholding constitutionality of fair-share service fees).

¹²⁷ *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012).

individual's First Amendment right to choose to dissent from the project of unionism and to join opposing political associations; refusing to extend to individuals a First Amendment right to refuse to pay fees to cover employment-related representation ensures a structural interest in facilitating the sorts of civic organizations that foster informed political participation.

Unionism may or may not be a good idea. Unions as civic associations may or may not be able to sustain their memberships. But if unions fail to sustain themselves in the marketplace of civic associations, it should not be the result of the Court's reinterpretation of the freedom of speech.

Finally, the above analysis illustrates once more how the self-governance interest, as theorized here, departs from prior articulations. One can accept that a public union's collective bargaining speech is indirect political speech, and yet offer an explanation, grounded in the overarching purpose of the First Amendment, for why the balance, nevertheless, must be struck in the way that existing precedent has set. Curtailing the freedom of speech, on this account, is necessary to prevent the erosion of the civic associations that make responsive and responsible governance more possible.

It matters not whether fair-share services fees are political speech or economic speech. The critical question, instead, is how much constitutional protection is warranted to prevent the compulsion of indirect political speech given the burdens a broader right will place on important existing civic associations. This is an entirely different type of First Amendment balancing. It recognizes that the interest in protecting forums for collective political action is rooted in the First Amendment itself and pays due respect to "the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects."¹²⁸

The significance of these trade-offs is not merely hypothetical. The two most salient explanations for the weakening of policy responsiveness and electoral accountability in political science today relate to the weakening of American political parties and American civic associations. Preserving and fostering the associational life of Americans, through political parties and civic associations, may well offer the most promising avenue by which to address the fundamental weakening of the channels of democratic accountability in the United States today.

IV. CONCLUSION

The above is obviously a preliminary and provisional retheorizing of the self-governance interest. Its purpose is to persuade those critical of the trajectory of First Amendment jurisprudence under the Roberts Court that our scholarly efforts should be devoted to providing similarly inclined Justices on the Court a more coherent basis for limits to the freedom of speech and,

¹²⁸ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting).

further, that this will require accepting a properly conceptualized self-governance interest as *the* theoretical foundation of First Amendment doctrine. The distinctive value added of the self-governance interest is that it provides internal First Amendment limits to the freedom of speech. It is also firmly grounded in the Amendment's text, history, and purpose. The full doctrinal implications, of course, would need to be worked out, area by area. In many areas, the conclusions are likely to be that long-standing precedents make sense. In a number of critically contested areas, however, the approach outlined here suggests a need for change. For now, the critical piece is that this project be undertaken.

